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620599—61——1

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

McCRORY HOLDING COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 1, 1961.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–28) is reported at 294 F. 2d 812.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1961 (App. B, *infra*, p. 29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When, after the expiration of a temporary taking, the United States retains possession of the land without the consent of the owner and immediately files a complaint to condemn the fee, is the property to be valued for the purposes of determining just compensation as of that time or later (as the court of appeals held) as of the date of the trial or the date on which the government files a declaration of taking?

STATUTES INVOLVED

The condemnation complaint in this case was filed pursuant to the Act of August 1, 1888, 25 Stat. 357, as amended, 40 U.S.C. 257. It provides as follows:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

The Declaration of Taking Act, 40 U.S.C. 258a–f, provides in pertinent part as follows:

> In any proceeding in any court of the United States outside of the District of Columbia

which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. * * *

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. * * * [40 U.S.C. 258a].

STATEMENT

This case deals with the date as of which property condemned by the United States is to be valued for purposes of determining just compensation. It involves land acquired in connection with the Orlando Air Force Base in Orange County, Florida. The pertinent facts, as stipulated by the parties (R. 78–86), may be summarized as follows:

1. In 1942 more than 500 acres, including all the lands here involved, were leased to the United States (R. 78). The United States remained in possession under the original and subsequent leases until their terms expired on June 30, 1953 (*ibid.*).

On September 3, 1953, the United States filed a complaint (Case No. 624 Orl. Civ.) to condemn approximately 255 acres—

> for a term of years ending June 30, 1954, extendible for additional yearly periods thereafter until June 30, 1958, at the election of the Secretary of the Air Force, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof * * * [R. 80].

The 255 acres were part of the property previously leased. The complaint stated (R. 80) that the United States had been in continuous possession of the 255 acres since July 1, 1953, and asked for an order of possession. No such order was entered, but on January 8, 1954, the government filed a declaration of taking covering those acres (*ibid.*).

The United States gave notices of election which successively extended the term to June 30, 1957, and remained in possession to that date (R. 81). It gave no notice extending the term beyond June 30, 1957.

2. The United States filed the present action (Case No. 857 Orl. Civ.) on July 2, 1957 (R. 84). "The plaintiff was in possession at the time of all of said tracts as it had a right to be under the provisions of the estate taken in Case No. 624 Orl. Civ. * * * except tract No. 414–E–2" (R. 84). The leasehold expired on June 30, 1957, and the suit was one to condemn the fee title to approximately 51 acres, as well as various easements and other interests in seven other tracts of land (*ibid.*). With the exception of one tract (414–E–2) containing 1.89 acres, in which the government took a 15-year easement for sewage treatment facilities, all of the lands covered by the complaint in this action (Case No. 857) had previously been included in the temporary taking involved in Case No. 624 (R. 84; see App. C, *infra*, p. 30).

The filing of Case No. 857 had been requested by the Secretary of the Air Force by letter to the Attorney General, dated June 28, 1957 (R. 29, 84), which also—

> requested that an order be procured from the court granting possession of the land to the United States effective as of 1 July 1957.[1]

Although the complaint requested an order of immediate possession, no such order was entered and no motion therefor was made by the United States (R. 85).

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[1] June 28 was a Friday. The intervention of a weekend was presumably the reason the case was filed on July 2 rather than on July 1.

"[N]or has the Government through any of its agencies notified the landowners that it has discontinued possession under Case No. 624 Orl. Civ., as to any part of said 255.07 acres. Nor has the United States, as Plaintiff in Case No. 857 Orl. Civ., or otherwise, ever advised the landowners that it is in possession of any part of said land pursuant to Case No. 857 Orl. Civ." (*ibid.*).

At the request of the Secretary of the Air Force, amended complaints were filed on October 2, 1958 and December 8, 1958 (R. 28–77, 85). The amendments provided for the acquisition of additional land and additional interests in portions of the land already involved in the proceeding, the revision of the description of certain tracts, and the deletion of other tracts. Each of the two amended complaints, like the original complaint, asked, as requested by the Secretary (R. 29, 54), for an order of immediate possession (R. 31, 56). No such order was entered (R. 85).

On the basis of the foregoing stipulated facts, the parties requested the district court to determine, in advance of trial, the date as of which the several tracts were to be valued (R. 90). On April 9, 1959, the court held that the property would be valued as of the date of trial (*ibid.*). The United States filed a timely petition for rehearing (R. 90–91), and also moved the court to amend its order fixing the time of valuation to include the necessary recital under the Interlocutory Appeals Act (28 U.S.C. 1292(b)) (R. 92–93).

While the foregoing motions were pending, the United States, on November 20, 1959, filed a declaration of taking and deposited with the court estimated compensation totaling $292,232 (R. 94–114). On March 16, 1960, it filed a third amended complaint (R. 115–130), which conformed the second amended complaint to the declaration of taking.

On May 16, 1960, the district court entered the order from which this appeal was taken (R. 131–136). It fixed November 20, 1959—the date on which the declaration of taking was filed—as the date of valuation (R. 135). It also made the requisite findings for appeal under the Interlocutory Appeals Act (R. 135–136).

3. The Court of Appeals for the Fifth Circuit affirmed. The court stated (App. A, *infra*, pp. 25–27, emphasis in original) that, in the earlier condemnation case (No. 624), the district court had entered an order providing that, in its final judgment, it "will also retain jurisdiction for the payment of just compensation for any occupancy by the Plaintiff after the expiration of the terms which may be condemned or extensions thereof * * * *for whatever purpose said continued occupancy may be*"; and that, under the stipulation that the United States was in possession of the tracts under the estate taken in Case No. 624 when it filed its condemnation complaint on July 2, 1957, and has not notified any of the landowners that it had discontinued possession under that case (see *supra*, p. 5), "the character of the possession by the United States of the interests in the lands sought

to be condemned in this action (No. 857), filed July 2, 1957, was that fixed by the course of dealings between the parties, including the still pending judicial proceeding."

The court rejected the government's contention that this case is governed by *United States* v. *Dow*, 357 U.S. 17 (App. A, *infra*, pp. 20–27). In *Dow*, this Court held that where the United States, after filing a condemnation action, entered into physical possession of the property, the owner's claim for just compensation arose at the time physical possession was taken, rather than three years later when the United States filed a declaration of taking covering the same property. The court below stated (*id.*, p. 27) that the government's possession in the present case "bears no resemblance to the kind of possession the Government would have taken under the 'physical seizure' method of obtaining possession which is discussed in the *Dow* case." The court further stated (*id.*, p. 27) that the interests covered by the declaration of taking "differed materially" from the interests described in the original condemnation complaint filed on July 2, 1957, and that "[t]o take care of these changes" the government had filed two amendments to its original complaint, and a third amendment after the declaration of taking to conform the complaint to the latter. The court concluded (*id.*, p. 28):

> It is clear that the Government was uncertain as to exactly what it wanted until the time it filed the declaration of taking November 20, 1959. * * * Not until that time had it determined exactly what it desired to appropri-

> ate, and not until that time did it perform any overt act fixing the extent and terms of its appropriation and the precise rights of the landowners to compensation. * * * We think it is clear that the first appropriation or taking which fixed the right of the United States to possess and of the landowners to collect just compensation was the declaration of taking of November 20, 1959, and that the court below correctly fixed that date as the time of taking.

REASONS FOR GRANTING THE WRIT

1. The court of appeals held that the landowners' right to just compensation did not arise until the government filed a declaration of taking on November 20, 1959—more than 28 months after it had filed its condemnation complaint. This holding is contrary to the principles enunciated by this Court in *Dow* v. *United States*, 357 U.S. 17, for determining when a claim for just compensation arises.

In the *Dow* case, the United States, after filing a condemnation action, had entered into physical possession of the property, pursuant to court order. Three years later the government filed a declaration of taking covering the same property. This Court held that the owner's claim for just compensation arose when physical possession was taken, rather than when the declaration of taking was subsequently filed. The Court stated (p. 22) that the "usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking." It ruled (p. 23) that "when the Government files a

declaration of taking before it has entered into possession of the property the filing constitutes the 'taking.' But * * * where a declaration is filed *after* the Government has taken possession * * * the date of 'taking' is the date on which the Government entered and appropriated the property to public use."

In the present case, when the government filed its condemnation complaint on July 2, 1957, it was already in possession of the property through having previously condemned a leasehold interest and then keeping possession after it expired. The keeping of possession plus the filing of a complaint to condemn the fee were the acts by which the government "appropriated the property [the fee] to public use." By those acts the United States was asserting its authority, previously exercised in keeping possession of the property, to appropriate the landowners' entire interest in it. It was accordingly those acts—and not the subsequent filing of the declaration of taking—"which fixed the right of the United States to possess and of the landowners to collect just compensation" (App. A, *infra*, p. 28). The obvious purpose of the declaration of taking was to protect the government against further loss as a result of the district court's ruling that the property would be valued in a rising market as of the date of trial. The declaration would fix a cut-off date for valuation and thus avoid still further increases in what would ultimately have to be paid; it was also intended to stop the running of interest.

The court of appeals attempted to distinguish the *Dow* case upon the ground that in *Dow* the entry into possession was itself a hostile seizure constituting a "taking" whereas in the instant case the United

States peacefully entered under a consensual lease, continued in possession under a leasehold acquired by eminent domain, and after the expiration of the term remained as an overstaying tenant. But whatever may be the rule where the United States initiates condemnation proceedings while it is in possession under an unexpired lease, in the present case its possession was no less adverse to the former owner than in *Dow*. The leasehold acquired by eminent domain expired on June 30, 1957. There was no notice of renewal. Nevertheless the government did not vacate. It continued to hold possession and, two days later,[2] it filed a complaint to condemn a fee interest in the land. Since the government was in possession and respondent did not challenge its right, no order awarding possession was necessary or obtained. It is plain, nevertheless, that the government was in possession after June 30 (or at the latest July 2) not under the expired leasehold but under a taking of the fee. The *Dow* decision is therefore squarely applicable; and the decision below is wrong.

There is nothing inconsistent with this analysis in the sentence in the stipulation of facts (R. 84) reciting that the "plaintiff was in possession at the time of all said tracts as it had a right to be under the provisions of the estate taken in Case No. 624 Orl. Civ." Although the phrase "at the time" could grammatically refer to the date on which the complaint was filed, a careful reading of the full paragraph shows that no such precise reference was intended. First, it is obvious that the United States had no right to be

[2] The delay was due to the intervention of a weekend.

in possession of the land after June 30, 1957, under the provisions of the leasehold, for it was taking no steps to vacate the property or to restore it to its former condition. Second, the very next sentence in the paragraph refers back to a letter written during the term of the leasehold on June 28, 1957, clearly expressing the intentions of the acquiring agency. For both reasons, it is apparent that the sentence was intended simply to explain how the United States came to be in possession of the land and not to describe the legal source of its possession after June 30, 1957.

2. The court of appeals also reasoned (App. A, *infra*, pp. 27–28) that since the property interests covered by the condemnation complaint "differed materially" from the property covered by the declaration of taking, "[n]ot until that [latter] time had [the government] determined exactly what it desired to appropriate, and not until that time did it perform any overt act fixing the extent and terms of its appropriation and the precise rights of the landowners to compensation." This ruling exaggerates the extent, and misinterprets the significance, of the differences between the property interests involved in the two proceedings. We have set forth in Appendix C, *infra*, p. 30, a table showing the differences. The principal value of the property interests taken lies in two fees. In the original complaint, their respective areas were 20 acres and 31.57 acres. In the declaration of taking, those areas were increased to 20.33 and 39.72 acres, respectively. The increase in the first tract is plainly minimal. The additional acreage taken in the second tract, while substantial,

does not justify treating the major portion of that tract (31.57 acres) as not having been taken until the declaration of taking was filed. On the contrary, all that it establishes is that the additional area should be valued as of that date, since that is when those 8.15 acres were appropriated to the public use. The other changes made by the declaration of taking—primarily in the kind and location of various easements taken—are not so substantial as to justify the conclusion of the court of appeals (App., *infra*, p. [illegible]) that not until the declaration of taking was filed had the government "determined exactly what it desired to appropriate."[3] Such "alteration[s] in the property interest taken" do not change the date of taking; nor do they "prejudice the property owner," since he is compensated for whatever interests the government ultimately acquires. See *Dow* v. *United States*, 357 U.S. at 26.

3. The question whether, when the government already is in temporary possession of real property, the claim to just compensation for the taking of the fee arises when the government files an action to condemn that interest, or at some later date, is important in the conduct of federal condemnation proceedings. The leasing or condemnation by the fed-

[3] Changes in the sewage, water and access easements were made primarily to make them perpetual and to change their location or description to some extent. Such changes frequently occur with regard to easements of that nature. Except for the 20-acre easement in the Lake, as to which the reason for exclusion from the declaration of taking does not appear, the easements represent some 6% by area (4.58 acres of the 64.23 acres), and much less of the estimated value, of the total acreage involved.

eral government of temporary interests in real property is a wide-spread practice, and the government frequently condemns the fee interest after it has entered into temporary possession. In the present case, there apparently has been a substantial increase in the value of the land during the 28-month interval between expiration of the temporary taking and filing of the declaration of taking. During the current period of rising real estate values, the rule promulgated by the court below will substantially increase the cost of federal condemnation. Furthermore, the decision below, by limiting the *Dow* case to the situation where the entry into possession occurs after the condemnation suit is filed, could lead to the same type of manipulations, operating to the disadvantage of either the landowner or the government, that the *Dow* rule was designed to prevent. See *Dow*, 357 U.S. at 25. The decision below, unless reviewed, will also generate unnecessary further litigation as to the meaning of *Dow*.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
Attorney.

NOVEMBER 1961.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 18405

UNITED STATES OF AMERICA, APPELLANT, VERSUS McCRORY HOLDING COMPANY, ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(September 1, 1961)

ROGER P. MARQUIS, Attorney, Department of Justice [with him on the brief were former Assistant Attorney General PERRY W. MORTON and former United States Attorney E. COLEMAN MADSEN], for appellant.

J. R. WELLS for appellee.

Before CAMERON and BROWN, Circuit Judges, and HANNAY, District Judge.

CAMERON, Circuit Judge: This interlocutory appeal involves the correct determination of the time of the taking of several parcels of land or interests therein to the end that such time may be fixed before the eminent domain proceedings are brought to the stage of ascertaining and fixing the amount of the damages. The lands and interests the appellant United States seeks to acquire by this action are to provide a strategic addition to the Orlando Air Force Base in Florida. The facts are not in dispute, being established by public records and stipulations entered into between the parties. The main facts and the court's opinion

of the law are set forth in its order of May 16, 1960, from which this appeal is taken. The major portion of the order is copied here as a correct statement of what is before this Court:

> "This cause coming on to be heard upon petition of Plaintiff for rehearing of the Order entered herein on April 9, 1959, and also upon plaintiff's motion filed April 17, 1959, to amend said order of April 9, 1959, and also upon Plaintiff's further motion served May 6, 1960, and after hearing argument of counsel for the respective parties and upon due consideration the Court being fully advised in the premises, this Court finds and does hereby
>
> "ORDER that, in view of the Court's desire to incorporate into its order the finding requested in said Motion to Amend and further in view of the filing herein on November 20, 1959, of the Declaration of Taking herein and of the filing on March 16, 1960, of the Third Amended Complaint herein, said Order of April 9, 1959, is hereby amended to read as follows:
>
> " 'Defendant owners in 1942 leased over 500 acres of land to the United States. The leases embraced all tracts involved in this action, including tracts brought in by the amended complaint. The leases expired on June 30, 1953. The Government remained in possession of portions of the 500 acres.
>
> " 'The Government on September 3, 1953 filed a complaint (Case No. 624 Orl. Civ.) for condemnation of a leasehold of 255.07 acres out of the aforementioned 500 acres. The condemned term was to end June 30, 1954, but included the provision that yearly extensions until June 30, 1958 could be obtained by the Government by filing 30-day notices of election. About four months after filing the complaint and on January 8, 1954, the Government filed a declaration of taking and paid $20,135 into Court intended to cover the year ending June 30, 1954. The

Government exercised its extension powers for an additional three years, the last of which ended June 30, 1957, and made further deposits for each year. The Government remained in possession as a holdover tenant after June 30, 1957.

"'On July 2, 1957, the Government filed the original complaint herein, seeking to take the fee and easements in various tracts totalling 87.9 acres. All of the tracts except one were a part of the 255.07 acres mentioned above. Tract 414–E–2 was not included in Case No. 624 Orl. Civ. The tracts belonging to these defendants may be placed in the following categories:

[Paragraph omitted.]

"'On October 2, 1958 the Government filed its first amended complaint in this case seeking to increase the estates taken as to Tracts 414–E–1 and 414–E–2 from temporary easements to terms of years for the same period. It also sought condemnation of additional temporary easements over Tracts 414–E–S and 414–E–9. In addition such amended complaint clarified a previous demand by setting up a claim for a temporary easement over Tract 420–E. The parties stipulate that Tract 414–E–6 was dismissed. The second amended complaint was filed December 8, 1958.

"'On November 20, 1959, Plaintiff filed its declaration of taking herein, the estimated compensation [in the sum of $292,232.00] set out in said declaration of taking having been paid into court on November 19, 1959. On March 16, 1960, Plaintiff filed the third amended complaint herein.

"'With the declaration of taking and the various amended complaints and the stipulations in the case the tracts now involved may be placed in the following categories:

"In Possession or Use on July 2, 1957, and named in original complaint (Part of 255.07 acres):

Fee

414–1 Acreage specified in original complaint (20.00) acres changed by declaration of taking to 20.33 acres.

414–2 Description in original complaint charged and acreage enlarged by declaration of taking from 31.57 acres to 39.72 acres

414–E–7 Temporary easement of 15 years as sought in original complaint changed to perpetual easement by declaration of taking

"In Possession or Use on July 2, 1957 and Included in original complaint but not by same tract number as below (Not part of 255.07 acres):

Easement

422–E This narrow strip (0.11 acres) was a part of 414–E–2 included in original complaint. Most of 414–E–2 is no longer involved. The easement now sought is a perpetual easement instead of 15-year easement as originally sought.

"In Possession or Use on July 2, 1957, and first named in first amended complaint:

Easement

414–E–9 (0.37 acres) Temporary easement sought by first amended complaint increased by declaration of taking to perpetual easement

"Not clear whether in Possession or Use Since June 30, 1953 but named in amended complaints:

Easement

420–E (0.15 acres) Temporary easement sought by first amended complaint increased by declaration of taking to perpetual easement

"'The Government has continued to use and assert possession of all the tracts, with the possible exception for a time of Tract 420–E and for a time of part of 414–2, and also continued in possession of other tracts included in the aforementioned Case No. 624 Orl. Civ. No order of possession has ever been obtained in Case No. 857 Orl. Civ. nor did the Government file a declaration of taking prior to November 20, 1959, or make any deposit into Court prior to November 19, 1959.

"'The foregoing substantially states the substance of the stipulation between the parties and adds the fact of the filing of the declaration of taking and of the filing of the third amended complaint. Respective counsel have requested the Court upon this statement of fact to determine the date of valuation of the several tracts. This for the reason that counsel may arrange proof in accordance with the issue defined by the Court.

"'The Court therefore holds that November 20, 1959, the date of the filing of said declaration of taking, will be the date of valuation and the parties will submit proof of valuation as of such date.

"'Pre-Trial Order hereafter to be entered in this cause will include this determination.

[Paragraph omitted.]

"IT IS FURTHER ORDERED that Plaintiff's petition for a rehearing, except to the extent that it may have been granted by the foregoing amendment of said order of April 9, 1959, is hereby denied."

On its appeal the United States contends basically that the damages should be fixed as of July 2, 1957, the date of filing the present condemnation action, No. 857 Orl. Civ. The appellees contend that the court below fixed the correct date. We agree with

the appellees and hold that the date fixed by the court below was the correct date for fixing the damages.

What constitutes a taking by the United States in the exercise of its sovereign power depends on many factors, including the wording of the applicable constitutional or statutory provisions and the relationship between the parties affected by the act of taking. In a recent annotation[1] dealing primarily with the question of when interest on the award of damages should begin to run, but accepting that interest should be figured from the date of taking, the headings are enumerated under which the various times of taking have been established by various courts considering different states of facts.[2]

The Government relies chiefly on *United States* v. *Dow*, 1958, 357 U.S. 17, reversing *Dow* v. *United States*, 5 Cir., 1956, 238 F. 2d 898, as supporting its position. In that case the Government condemned an easement for a pipe line right of way acting under authority of the Second War Powers Act of 1942, 56 Stat. 177.[3] The strip of land, comprising 2.7139 acres

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[1] 36 ALR 2d pp. 447, et seq.

[2] (a) The time of the appropriation and the entry on the property;

(b) the time of the vesting of title; (c) the time of the filing of the declaration of taking; (d) the time of the notice of the intention to take; (e) the time of issuance of summons; (f) the time of filing of oath of appraisers; (g) the time of the injury to the property; (h) the time the property was actually entered upon and possession actually taken; and (i) miscellaneous dates based upon the peculiar facts of the individual case.

[3] Which reads in part as follows: " * * * The Secretary of War * * * may acquire * * * by condemnation, any real property, temporary use thereof, or other interest therein * * * Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occu-

through a body of 617 acres, was taken by the Government upon an order of court entered shortly after the filing of the condemnation petition, the order vesting right of immediate possession in the Government. Dow acquired his title to the strip more than two years after the United States had filed its condemnation proceedings and taken possession of the strip and laid the pipe line in it, and his title was taken subject to the condemnation proceedings.

The trial court granted summary judgment against Dow's claim to the money paid by the Government as compensation, holding that it violated the Anti-Assignment Act, 31 U.S.C.A. § 203. The Court of Appeals reversed, holding that the time of taking was fixed by the filing of a declaration of taking and the deposit of estimated compensation, which took place more than two years and seven months after the Government had entered into possession of the strip of land. This Court [4] held that the Declaration of Taking Act, 40 U.S.C.A. § 258(a), had removed much of the uncertainty existing prior to its passage by fixing a definite time of taking and of accrual of the claim for compensation. The opinion stated, however, that nothing said in it should be construed as inconsistent with the equitable rule that, where the declaration of taking was filed on a date subsequent to the passing of possession to the Government, the value of the property should be determined as of the

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pied, used, and improved for the purposes of this Act, notwithstanding any other law."

[4] In *Dow* v. *United States*, 238 F. 2d 898, citing two Fifth Circuit Cases, *11,000 Acres of Land, Etc.* v. *United States*, 152 F. 2d 566, certiorari denied, 328 U.S. 835, and *Anderson* v. *United States*, 179 F. 2d 281.

date possession was acquired. It relied heavily on the two cases of this Court cited in Footnote 4, supra.[5]

We do not consider the holding of the Supreme Court in *Dow* inconsistent with what the trial court did here. *Dow* stressed (357 U.S. at p. 19) that, under the terms of the Second War Powers Act, supra, the district court ordered the United States into the immediate possession of the strip of land condemned, and that the United States entered into physical possession and began laying the pipe line across the tract within ten days of the filing of the petition, completing it in 1943. We quote a portion of the Supreme Court's opinion (pp. 20–21):

> "For it is undisputed that '[since] compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.' *Danforth* v. *United States*, 308 U.S. 271, 284; cf. *United States* v. *Dickinson*, 331 U.S. 745. We hold, contrary to the Court of Appeals, that the 'taking' did not occur in 1946 when the Government filed its declaration of taking, but rather *when the United States entered into possession of the land in 1943*. It follows that the landowners in 1943 were entitled to receive the compensation award and that Dow is not entitled to recover in this action." [Emphasis supplied.]

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[5] In the case reported in 152 F. 2d 568, it is stated: "We regard it as well settled that, either where no declaration of taking is filed or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired."

This same language was repeated in the latter case (179 F. 2d at 284) and several Supreme Court cases were cited as authority for the statement in each instance.

Following the foregoing quotation the court proceeded to define the two ways in which the United States normally takes property pursuant to its power of eminent domain (p. 21–22):

> "Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: *it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings.* Under the first method—physical seizure—*no condemnation proceedings are instituted,* and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, to recover just compensation. See *Hurley* v. *Kincaid,* 285 U.S. 95, 104. Under the second procedure the Government may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land, Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. § 257 [the Declaration of Taking Act]; Act of August 18, 1890, 26 Stat. 316, 50 U.S.C. § 171, or proceed under other statutes which enable it *to take immediate possession upon order of court* before the amount of just compensation has been ascertained. Act of July 18, 1918, 40 Stat. 904, 911, 33 U.S.C. § 594; Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177 (*employed by the Government in the present case*).
>
> "Although in both classes of 'taking' cases—condemnation and physical seizure—title to the property passes to the Government only when the owner receives compensation, see *Albert Hanson Lumber Co.* v. *United States,* 261 U.S. 581, 587, or when the compensation is deposited into court pursuant to the Taking Act, see *infra,* the passage of title does not necessarily

> determine the date of 'taking.' The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking. It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues. See *United States* v. *Lynah*, 188 U.S. 445, 470–471; *United States* v. *Rogers*, 255 U.S. 163; *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299. The owner at the time the Government takes possession 'rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment.' *23 Tracts of Land* v. *United States*, *supra*, at 970." [Emphasis added.]

These quotations from *Dow* emphasize the difference between that case and this one and, in our opinion, demonstrate the correctness of the judgment of the court below.

Nobody contends that the Government at any time resorted to the first method described in the *Dow* case—physical seizure—and nobody takes the position that these appellees are relegated to the Tucker Act to recover the just compensation due them. The parties to this action started out leasing this land by private treaty. But, though this was true, the Government decided to supplement the contractual relationship by resorting to court proceedings under the Eminent Domain Statutes.*

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* E.g., the parties to this litigation entered into the contract for a term beginning April 1, 1942, and ending June 30, 1942, with right of renewal during the continuation of the national emergency then existing. Nevertheless, the Government, in November, 1943, began condemnation proceedings seeking possession by order of court of the identical estates it already had in the parcels of land. The only difference between the

Moreover, the Government filed its case No. 624 Orl. Civ. on September 3, 1953, and operated under that taking through the end of the term covered by it, June 30, 1957. Its petition there had asked for the entry of an order of condemnation, but no order was ever entered. In lieu of the order the Government, four months after it failed its petition, *filed a declaration of taking* and paid into the registry of the court the sum estimated by the Government as just compensation. It continued to deposit such payments to the end of the term named in its *declaration of taking*.

In that case, the court entered an order, which presumably, is the last one ever entered, in which the court retained jurisdiction of the case for the periodic determination of rental compensation to the end of the term, which was to be determined by the Government's election, and for the entry of a final judgment. The order provided further:

> "In said final judgment the Court will also retain jurisdiction of this cause for the purpose of determining and making provision for the payment of just compensation for any failure on the part of Plaintiff when it surrenders the land to the Defendants on the expira-

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terms of the contract and the terms of the attempted condemnation was that, under the former, the Government had agreed to a rental of $5,347 per annum, whereas under the petition for condemnation, the Government estimated this compensation at the sum of $3,525 per annum. The Government deposited the amount of its estimate in court, but the court below held that the Government could not condemn property it already owned under contract when it sought only to reduce the amount of the annual rental payments. That action was affirmed by this Court, see *United States* v. *534.07 Acres of Land in Orange County, Florida, et al.*, 5 Cir., 1946, 157 F. 2d 828.

> tion of the original term condemned and extensions thereof, to return the land in as good condition as that existing at the time of the Plaintiff originally entering upon the same * * * In said final judgment, the Court will also retain jurisdiction for the payment of just compensation for any occupancy by the Plaintiff after the expiration of the terms which may be condemned or extensions thereof, whether such occupancy is in connection with making restoration of said premises or in connection with the exercise by the Plaintiff of its right to remove within a reasonable time after the expiration of the terms condemned or extensions thereof any and all improvements and structures placed thereon by and for the United States of America or for *whatever purpose said continued occupancy may be.*" [Emphasis added.]

That case, No. 624, is still pending and undisposed of and the parties to it—being the identical parties to the present civil action—are still bound by the terms of the orders entered in it. The judicial record therefore, refutes the suggestion that the parties before us were pursuing the seizure—Tucker Act route on July 2, 1957. The stipulation signed by the parties contained these words: "On July 2, 1957, the United States filed a suit to condemn (Case Number 857 Orl. Civ.) * * * The Plaintiff was in possession at the time of all of said tracts as it had a right to be under the provisions of the estate taken in Case No. 624 Orl. Civ. * * * *"*

The stipulation also stated: "* * * nor has the Government through any of its agencies notified the landowners that it has discontinued possession under Case No. 624 Orl. Civ. as to any part of said 25.07 acres. Nor has the United States, as Plaintiff in case No. 857 Orl. Civ., or otherwise, ever advised the land-

owners that it is in possession of any part of said land pursuant to case No. 857 Orl. Civ."

Under these undisputed facts it seems to us that the character of the possession by the United States of the interests in the lands sought to be condemned in this action (No. 857), filed July 2, 1957, was that fixed by the course of dealings between the parties, including the still pending judicial proceeding, No. 624. That possession bears no resemblance to the kind of possession the Government would have taken under the "physical seizure" method of obtaining possession which is discussed in the *Dow* case. Yet the entire thrust of appellant's argument is based upon the contention that the possession held by it on June 2, 1957 was one acquired by mere entry into physical possession, leaving the assumption that the appellees may pursue the remedy given them under the Tucker Act.[7]

To the above should be added the fact, also undisputed, that the acreage taken in fee and the estates carved out of the several parcels by the declaration of taking of November 20, 1959 differed materially from the acreage and estates described in the original complaint filed July 2, 1957. To take care of these changes the Government had filed two amendments to its original complaint, and filed a third amended complaint after the declaration of taking so as to conform the pleadings in the condemnation suit to the lands and estates actually acquired in the declaration of taking.

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[7] E.g., this statement appears in the appellant's brief: "The basic premise on which the Dow case rests is that the United States 'can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings * * *.'"

It is clear that the Government was uncertain as to exactly what it wanted until the time it filed the declaration of taking November 20, 1959. It was in full control of the pending litigation and could have entered an order of possession at any time, and could thereby have fixed the date as of which compensation should be figured. But it did not do that. It chose to proceed, under the Declaration of Taking Act, to file the declaration in the pending litigation and thereby to fix the exact date of taking and the precise lands and estates acquired by it. Not until that time had it determined exactly what it desired to appropriate, and not until that time did it perform any over act fixing the extent and terms of is appropriation and the precise rights of the landowners to compensation.[8]

We think it is clear that the first appropriation or taking which fixed the right of the United States to possess and of the landowners to collect just compensation was the declaration of taking of November 20, 1959, and that the court below correctly fixed that date as the time of taking.

The judgment of the lower court is, therefore, affirmed and the cause remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED.

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[8] See, in addition to *Dow*, *Danforth* v. *United States*, 308 U.S. 271; *United States* v *Westinghouse Electric & Manufacturing Co.*, 339 U.S. 261; *Kimball Laundry Co.*, v. *United States*, 338 U.S. 1, and *Benedict* v. *City of New York*, 2 Cir., 96 Fed. 789; and cf. *Goodyear Tire & Rubber Co.* v. *United States*, 276 U.S. 287; and *Olson* v. *United States*, 292 U.S. 246, 254.

APPENDIX B

JUDGMENT

EXTRACT FROM THE MINUTES OF SEPTEMBER 1, 1961

No. 18405

UNITED STATES OF AMERICA VERSUS McCRORY HOLDING COMPANY, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

APPENDIX C

The two plats in the printed record (pp. 21–23 and 112–114)[1] show the two principal areas taken in this case as hatched or darkened areas. The various easements, etc., are designated by circled letters and arrows, the detail of which was lost in reduction in size and printing.

The following chart shows the details:

Tract No.	Estate Sought in Original Complaint	Declaration of Taking
414-1 20 acres	Fee	Fee.
414-2 31.57 acres	Fee	Fee—7.45 acres added.
414-E-3 0.88 acres	15-year sewer easement	Fee—added to 414-2.
E-4		
E-5		
E-6		
414-E-7 2.19 acres	15-year access road and water easement.	Perpetual easement.
414-E-9 0.36 acres	Added by first amendment to complaint which sought 15-year easement for underground water lines.	Perpetual easement.
[The deposit for Tracts 414-1, 414-2, 414-E-7 and 414-E-9 was $291,920.00.]		
414-E-2 1.89 acres	15-year easement for sewage treatment facilities.	Now 420-E 0.11 acres perpetual easement.
420-E 0.15 acres	Temporary easement for 15 years for sewer lines.	Perpetual easement.
[A nominal estimate of $1.00 was made for each of these easements.]		

Tract 414–E–1, 20.07 acres, a 15-year easement to discharge treated sewage into Lake Overstreet with various other rights in the Lake, was omitted from the Declaration of Taking and from the Third Amended Complaint which superseded the earlier ones.

[1] The plats were reversed when the record was printed so that the one at R 21–23 should be at R 112–114 and vice versa.

U. S. GOVERNMENT PRINTING OFFICE: 1961